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Supreme Court, U.S.
FILED
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No. 93-1605

In The

Supreme Court of the United States

October Term, 1993

ALLIED VAN LINES, INC.,

Petitioner,

v.

GERALD OBERG, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

GEORGE F. GALLAND, JR.
Counsel of Record
CHARLES BARNHILL, JR.
DAVIS, MINER, BARNHILL & GALLAND, P.C.
14 West Erie Street
Chicago, IL 60610
(312) 751-1170

Attorney for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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The Older Worker Benefit Protection Act (OWBPA) provides that "no person may waive any right" under the Age Discrimination in Employment Act (ADEA) unless the waiver meets all requirements of the OWBPA. 29 U.S.C. §626(f)(1). The court of appeals for the Seventh Circuit held that this language means what it says. Hence the waivers obtained from respondents by petitioner Allied Van Lines, which ignored the OWBPA's central requirements, could not be enforced through "ratification" or any other doctrine that would render them effective to waive respondents' ADEA rights. The court of appeals also held that Allied could not recover the consideration it paid for these invalid waivers. The court rejected Allied's breach-of-contract theory for recovery of this consideration, because ineffective waivers cannot serve as the contract in a breach-of-contract damage suit. The court further held that Allied had waived all other theories of recovery by failing to present them in the district court.

These holdings are unassailable, and review should be denied.

STATEMENT OF THE CASE

Allied's group termination waiver program. Respondents Gerald Oberg, Nicholas Tautz, and Stephen Adams were part of a group of 65 employees involuntarily terminated by petitioner Allied Van Lines in a December 1990 reduction in force. The entire group was offered "Separation Agreements" which provided, in return for waivers, certain benefits over and above the company's standard

two-week severance benefit. The Agreements contained purported waivers of all claims against Allied "arising from and during employment or as a result of termination," including claims under the Age Discrimination in Employment Act (ADEA). The Agreements also purportedly waived the right to file any charge or suit under the ADEA. The Agreements provided that in the event of breach, the employee would forfeit any benefits still payable at the time of breach and would return benefits already received at the time of breach. Appendix to Petition (hereafter "App."), 2a-3a, 13a-14a.

At the time Allied carried out this group termination program, the waiver provisions of the Older Workers Benefit Protection Act (OWBPA), 29 U.S.C. §626(f), were in effect. Under the OWBPA, if a waiver of ADEA rights is requested "in connection with an exit incentive or other employment termination program offered to a group or class of employees," the waiver is ineffective unless the employer, among other things, (1) allows affected employees at least 45 days to consider whether to sign the waiver, and (2) informs the employees in writing of "any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program", and "the job titles and ages of all individuals selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible for or selected for the program." §626(f)(1)(F), (H).

Allied did not give the terminated group 45 days to consider whether to sign the agreements. Nor did it give any of the information specified by the OWBPA about

individuals selected and not selected for the group termination program. App. 4a. Allied has never offered evidence explaining why it did not follow these two requirements.

After filing timely EEOC charges, respondents filed an ADEA class action challenging the terminations of Allied's reduction in force.

District court proceedings. Allied moved to dismiss or for summary judgment. It asserted that by retaining the benefits they had received when they signed their waivers, respondents had "ratified" those waivers and had therefore waived their ADEA rights even if the waivers failed to comply with the OWBPA. The district court denied Allied's motion. The court held that waivers that fail to comply with the OWBPA cannot be made effective through "ratification". The court certified this ruling for interlocutory review under 28 U.S.C. §1292(b). App. 26a-28a.

Allied then answered the complaint and counterclaimed against respondents. The counterclaim alleged just one claim: breach of contract. Allied alleged that by filing this lawsuit, respondents had breached the waiver provisions contained in their Separation Agreements. The counterclaim sought return of the consideration paid to respondents plus "consequential damages", including attorney's fees incurred defending this lawsuit.

Respondents immediately moved for summary judgment, arguing that the undisputed facts showed that the waivers were invalid under the OWBPA, and that no breach-of-contract claim could be based on invalid waivers.

The district court took up respondents' motion on September 23, 1992. App. 35a-65a. Because of the eight-month delay that had been caused by Allied's "ratification" motion, a potential limitations deadline was approaching for having class members opt into the suit. Respondents therefore asked for expedited consideration of their summary judgment motion as to the damage counterclaims. Allied's counsel resisted this request and claimed he needed three or four weeks to collect affidavits in opposition to the motion. The court pressed him to explain what facts Allied might dispute. App. 41a. Allied's counsel then stipulated to the facts on which respondents' motion was based: that the respondents had not been given the information specified in the OWBPA for group termination programs or the 45 days to consider the waivers. App. 41a-42a. Allied had already admitted that the respondents had been offered the waivers in connection with terminating a group of 65 people in a December 1990 reduction-in-force.

Because the court had ascertained that Allied did not dispute the facts on which respondents' summary judgment motion was based, and because the court had already decided that waivers not complying with the OWBPA could not be "ratified", the court requested argument on why the motion should not be summarily granted. In response, Allied's counsel asserted a single argument: that even if the waivers were invalid under the OWBPA, they could support damage claims for breach of contract. App. 46a. The district court was unconvinced, and declared it would dismiss the counterclaims. App. 60a.

On October 22, 1992, the district court issued an amended order granting summary judgment. App. 31a-34a. The court found that Allied had failed to follow the OWBPA's heightened time and disclosure requirements for waivers requested in connection with a group termination program. Hence respondents' ADEA waivers were ineffective under the OWBPA. *Id.* The court then concluded that no claim could be brought for breach of ineffective waiver provisions. *Id.* Because this ruling was closely related to the previous "ratification" ruling, which had already been accepted for interlocutory review by the court of appeals for the Seventh Circuit, the district court certified the counterclaim ruling under 28 U.S.C. §1292(b). *Id.*

The court of appeals accepted the counterclaim appeal and consolidated it with the "ratification" appeal. The United States Equal Employment Opportunity Commission filed a brief *amicus curiae* supporting respondents and participated in oral argument.

The court of appeals' opinion. The court of appeals affirmed both the "ratification" and the "counterclaim" rulings. The court first affirmed the district court's findings that the waivers had failed to comply with the OWBPA's requirements for group termination programs. App. 5a-6a. The court then held that under the unambiguous text of the OWBPA, waivers which failed to comply with the OWBPA cannot be enforced through "ratification." App. 7a. The court further rejected Allied's "tender back" variation on the "ratification" argument. App. 8a-10a.

The court also affirmed summary judgment against Allied's breach-of-contract counterclaims. The court first rejected a procedural argument (which the petition for certiorari has abandoned) based on F.R.Civ. P. 56(c). App. 10a-11a. The court then affirmed the district court's holding that waivers that are unenforceable under the OWBPA cannot be enforced through a breach-of-contract damage suit. App. 11a. The court also rejected Allied's "equitable restitution" theory for return of its consideration. It held that Allied had neither pleaded nor argued such a theory in the district court and had therefore waived it. App. 11a-12a.

Allied petitioned for rehearing. The petition abandoned the main arguments Allied up to then had asserted. On the issue of the effectiveness of the waivers, Allied dropped its "ratification" theory. Instead, Allied asserted that its waivers had not violated the OWBPA's requirements for group termination waivers, arguing that those requirements only apply when the employees volunteer for termination. (The petition for certiorari has abandoned this argument.) As to its money claim, Allied dropped its breach-of-contract argument. Instead, it limited itself to its claim for "equitable restitution," and argued among other things that the panel had erred in holding that claim waived. No member of the court of appeals voted to rehear the case. App. 67a.

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS' "RATIFICATION" HOLDING IS PLAINLY CORRECT AND SHOULD NOT BE REVIEWED

The court of appeals held that ADEA waivers that violate the OWBPA cannot be enforced through "ratification." So clearly correct was this holding that Allied's petition for rehearing *en banc* did not challenge it. Allied likely would never have filed the present petition for certiorari if a panel of the Fifth Circuit had not subsequently and unexpectedly issued a contrary decision in *Walmsley v. Champlain Refining and Chemicals, Inc.*, 11 F.3d 534 (5th Cir. 1993).

While *Walmsley* does conflict with the decision below, that alone does not justify this Court's intervention. These are the first two circuits to reach the "ratification" issue under the OWBPA. As of this writing, a petition for rehearing is still pending in *Walmsley*, supported by the EEOC *amicus curiae*. This Court frequently denies petitions for *certiorari* notwithstanding an isolated conflict between circuits – especially where the challenged decision appears plainly correct. Such is the case here. The decision below is compelled by the OWBPA's text, and it is the only result that respects the OWBPA's purpose.

A. The OWBPA's Waiver Provisions

Congress passed the OWBPA's waiver provisions out of concern that employers were unfairly obtaining waivers of ADEA rights from employees who were in no position to evaluate the claims they were being asked to

surrender. *See, e.g.*, Senate Report 101-79, 101st Cong., 1st Session, p. 9. Congress viewed these problems as particularly serious in reductions-in-force, where "the need for adequate information and access to advice before waivers are signed is especially acute." Senate Report 101-263, 101st Cong., 2d Session, p. 32 (emphasis in original). Congress also worried that because most such older workers are not highly paid, they often face economic distress, and therefore face acute pressure to accept any benefits dangled at them for a waiver. Senate Report 101-79, 101st Cong., 1st Session, p. 9.

Congress also concluded that the common law of waivers had failed to protect employees facing these problems. Some courts had held that challenges to ADEA waivers should be dealt with under "ordinary contract principles." *See, e.g., Lancaster v. Buerkle Buick Honda Co.*, 809 F.2d 539, 541 (8th Cir. 1987). Other courts had fashioned a special "totality of the circumstances" test for ADEA waivers. *See, e.g., Cirillo v. Arco Chemical Co.*, 862 F.2d 448, 451-452 (3d Cir. 1988). Congress was dissatisfied with both of these judicial responses. See House Report No. 101-664, 101st Congress, 2d Session, p. 27.

To address these concerns, Congress fashioned the OWBPA's waiver provisions, 29 U.S.C. §626(f), reprinted at App. 87a-89a. For the first time under any federal statute, Congress has specified mandatory requirements for a waiver's form and substance. If even a single one of these requirements is not met, the waiver is declared ineffective to waive anything. §626(f)(1) says that "An individual *may not waive* any right or claim under [the ADEA] unless the waiver is knowing and voluntary," and that "a waiver *may not be considered knowing and voluntary*

unless at a minimum" it meets a long list of mandatory requirements. §626(f)(1) (emphasis added).

Eight of these requirements apply to any form of pre-lawsuit ADEA waiver.[1] In addition, Congress added two special requirements for group terminations. These requirements – the ones Allied ignored – are the heart of the statute. They apply whenever a waiver "is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees." In such cases, the employee must be given at least 45 days, rather than 21, to consider whether to sign. §626(f)(1)(F). Furthermore, the employee must be informed, in writing, of "any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program," and "the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not selected for the program." §626(f)(1)(H).

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[1] Under §626(f)(1)(A) through (F), (1) the waiver must be in writing; (2) it must be written in a way calculated to be understood not only by the particular individual from whom it is requested, but by "the average individual eligible to participate"; (3) it must specifically refer to the ADEA; (4) it cannot waive rights or claims that may arise after the date it is executed; (5) the consideration for the waiver cannot include anything to which the individual is already entitled; (6) the individual must be advised in writing to consult with an attorney before signing; (7) except in group termination programs, the individual must be given at least 21 days within which to consider the agreement; and (8) the agreement must allow the employee seven days after signing to revoke it.

Nowhere does this comprehensive statute regulating ADEA waivers mention "ratifying" a waiver, or hint that "ratification" is possible. Nowhere does the OWBPA mention tendering back the consideration as a requirement for challenging a waiver in court, even though the statute contains detailed provisions regulating judicial proceedings hearing such challenges. §626(f)(3). At no point in the two-year Congressional consideration of the OWBPA did any committee, or any individual Senator or Representative, mention any such doctrine.

B. The OWBPA's Text Forbids Enforcing Noncomplying Waivers Through "Ratification"

The contract law of some states provides in some circumstances that otherwise ineffective waivers can be enforced through "ratification." The court of appeals treated two versions of this "ratification" doctrine. In one, the employee ratifies the waiver by accepting additional benefits after he or she has notice of the grounds for challenging the waiver. In the other, the employee ratifies the waiver by retaining benefits already received, instead of tendering back the benefits to the employer. In both versions of "ratification," the result is that the waiver is enforced and the employee waives his or her rights.

Where it exists, the "ratification" doctrine is riddled with exceptions. All states which allow "ratification" of waivers nonetheless hold that certain kinds of deficiencies in waivers cannot be "ratified." Different states follow different rules as to whether deficient waivers can be "ratified" and if so, which particular deficiencies (such as

fraud, duress, mutual mistake, failure of consideration) will render a waiver unratifiable. *See Isaacs v. Caterpillar*, 765 F.Supp. 1359, 1372 (C.D.Ill. 1991); *Taxin v. Food Fair Stores, Inc.*, 197 F.Supp. 827, 831 (E.D.Pa. 1961); Annotation, "Tender as a Condition of Action – Release", 134 A.L.R. 6.

The "ratification" doctrine has generally fared poorly in federal courts construing waivers under federal statutes. In *Hogue v. Southern Ry. Co.*, 390 U.S. 516 (1968), this Court rejected the doctrine for waivers under the Federal Employers Liability Act, and the lower courts have almost unanimously applied *Hogue*'s holding to other federal statutes.[2]

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[2] The Eleventh Circuit applied *Hogue* to reject the tender/ratification doctrine under the ADEA. *Forbus v. Sears, Roebuck & Co.*, 958 F.2d 1036 (11th Cir.), *cert. denied*, 113 S.Ct. 412 (1992). The Fifth Circuit applied *Hogue* to reject the doctrine under the Jones Act. *Smith v. Pinell*, 597 F.2d 994, 996 (5th Cir. 1979). The Ninth Circuit applied *Hogue* to 42 U.S.C. §1983 and stated that *Hogue* rules out the doctrine in waivers under any federal remedial statute. *Botefur v. City of Eagle Point, Oregon*, 7 F.3d 152 (9th Cir. 1993). See also *Wahsner v. American Motors Sales Corp.*, 597 F.Supp. 991, 998 (E.D.Pa. 1984) (Auto Dealers' Day in Court Act); *Taxin v. Food Fair Stores, Inc.*, 197 F.Supp. 827, 830-831 (E.D. Pa. 1961) (Sherman Act).

In *O'Shea v. Commercial Credit Corporation*, 930 F.2d 358 (4th Cir.), *cert. denied*, 112 S.Ct. 177 (1991), and *Grillet v. Sears, Roebuck & Co.*, 927 F.2d 217 (5th Cir. 1991), the Fourth and Fifth Circuits applied a "tender/ratification" doctrine under ADEA waivers, without citing or discussing *Hogue*. The Fifth Circuit subsequently adhered to *Grillet* in *Walmsley, supra*, holding that *Hogue* should be limited to the FELA. *Walmsley* is thus the first court of appeals' decision to refuse to apply *Hogue* to other federal statutes. As of this writing (April 29, 1994), a petition for rehearing in *Walmsley*, supported *amicus curiae* by the EEOC, has not been ruled on.

However, there is no occasion to apply the above state or federal common law to determine whether ADEA waivers can be enforced by "ratification" if they fail to comply with the OWBPA. The OWBPA's text answers that question, and the answer is no. That text could not be clearer. It says that an individual "may not waive" any right under the ADEA unless the waiver is "knowing and voluntary", and says that to be "knowing and voluntary", the waiver must satisfy *all* of the OWBPA's requirements. As the court of appeals held, "ratification" enforces a noncomplying waiver, results in waiver of ADEA rights, and therefore violates this plain language.

Allied argues that this plain language has an unwritten exception. According to Allied, all this language means is that if the OWBPA requirements are not satisfied, "the employer will not be entitled to insist on enforcing the waiver *as originally given*." Petition at 17 (emphasis added). Similarly, the Fifth Circuit in *Walmsley* interpreted the language to mean that "such waivers are not knowing and voluntary and thus are subject to be avoided at the election of the employee." App. 79a.

Neither Allied nor the Fifth Circuit tries to explain how such meanings are consistent with the statute's language. If a noncomplying waiver can be ratified through some subsequent action, such as receipt or retention of benefits, then the employee *may* waive ADEA rights through a noncomplying waiver, contrary to the text. Similarly, the statute says nothing about allowing an employee, at his or her "election", to make the waiver valid. If the statute allows an "election" to make the waiver valid, then the employee *may* waive an ADEA right, contrary to the text.

This text ends the issue. This Court instructs that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there . . . When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.' " *Connecticut National Bank v. Germain*, 112 S.Ct. 1146, 1149 (1992), quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981).

C. "Ratification" Would Defeat the Purpose of the OWBPA's Group Termination Provisions

In seeking review, Allied offers "policy" arguments for grafting a "ratification" exception onto the unconditional text barring enforcement of a noncomplying waiver. "Policy considerations cannot override our interpretation of the text and structure of the act." *Central Bank v. First Interstate Bank*, ___U.S.___, 62 L.W. 4230, 4237 (1994). In any case, however, Allied's "policy" arguments carry no force. A "ratification" doctrine would contradict the purpose, and destroy the efficacy, of the OWBPA's group termination provisions.

First, even where employees are economically capable of tendering back the consideration they received when they signed the waivers, the "ratification" doctrine forces them to make a choice Congress said they do not have to make. Consider what happens to terminated employees like respondents, who give waivers but who never get the detailed statistical information the OWBPA specifies for group reductions. Under a "ratification" doctrine, those employees must later decide whether to keep the consideration, in which case they have waived their

claim, or to tender back the consideration and sue. They are forced to make that decision without the benefit of the information Congress said they were entitled to before deciding whether to waive their rights. (For example, as the district court noted, the present respondents, whom Allied says are barred by "ratification" from suing, have *never* received this information. App. 25a.) Thus, "ratification" would nullify Congress' scheme. It would force employees to decide whether to sue without the information Congress says is necessary to make the decision "knowing and voluntary."

Second, as the district court noted, the doctrine would encourage employers to ignore the OWBPA "in hopes that by the time their former employees discover that the waivers that they signed are voidable, they be in no economic position to tender back or refuse to accept special severance benefits accorded them." App. 25a. *Accord, Forbus v. Sears, Roebuck & Co., supra,* 958 F.2d at 1042; *Isaacs v. Caterpillar, Inc.,* 765 F.Supp. 1359, 1367 (C.D.Ill. 1991).

Against these policy considerations, Allied's arguments are weak. First, Allied says there is no basis to believe that "employees would be unable to tender back their enhanced severance payments if they were required to do so as a condition of maintaining their ADEA action." Petition at 20. This argument reflects a rosy, if not callous, view of the financial condition of older employees who lose their jobs without warning in reductions in force. The Congress that passed the OWBPA did not share that view. As discussed above, Congress was aware that most older workers are not highly paid and face terrifying financial insecurity when they are laid off.

As one court has put it, such workers are "unlikely to be able to put their severance payments aside for future 'tenders', or to be able to come up with the money to make such a tender at such later time as they acquire grounds to believe that a successful lawsuit might be mounted in connection with their retirements." *Isaacs v. Caterpillar, Inc., supra,* 765 F.Supp. at 1367.

Second, Allied pooh-poohs the idea that "ratification" might induce employers to ignore the OWBPA. It says employers want to avoid litigation and therefore "have a strong incentive to ensure that releases are enforceable from the outset under the OWBPA." Petition at 20. But this desire to avoid litigation cuts two ways. Where a reduction in force has been discriminatory, employers have an incentive not to give employees the OWBPA-mandated information that would reveal a pattern of discrimination and lead to ADEA litigation. "Ratification" plays into such employers' hands.

Third, Allied claims that if employees can keep the consideration and still sue, that will encourage them to "manipulate" employers by continuing to receive installment payments on their releases while planning to sue them once the payments have been received. Petition at 13. The greater danger, however, is that of manipulation by the employer – and "ratification" encourages that manipulation. Allied typifies the employer who fears the consequences of giving terminated employees the OWBPA-mandated information about its reductions in force. The employer therefore decides to ignore the OWBPA. For relatively small amounts, it secures purported waivers, loaded (like Allied's) with impressive-looking legalese. The claims covered in these purported

waivers may be worth tens or hundreds of thousands of dollars. The employer knows the waivers are worthless, but hopes the employees will think them valid. If this tactic forestalls legal action during the ADEA's short 300-day limitations period for filing an EEOC charge, the employer is likely home free.

The district court had this situation in mind when it observed that such an employer gets "what it bargained for – a faulty waiver for special severance benefits." App. 26a. "Ratification" would provide a backup defense for employers who get caught in such manipulation.

Fourth, Allied claims that it is easy for employees to raise triable issues of fact as to whether the OWBPA has been violated. For example, Allied hypothesizes that employees will routinely raise disputes over whether the employer has properly defined the organizational units for the statistical information required by the OWBPA. Allied argues that unless "ratification" is imposed, employees will use their waiver payments to finance such a flood of litigation. Petition at 14.

The historical record refutes this flood-of-litigation scenario. The OWBPA has been on the books now for three and a half years. For most of that time, no case authority supported a "ratification" requirement, and much district court authority ruled it out. During this period, tens of thousands of laid-off employees have signed ADEA waivers, and thousands of ADEA lawsuits have been brought. Yet in this period there have been exactly *six* reported cases in the entire country challenging waivers under the OWBPA. And in all but one of those six cases, the court disposed of the OWBPA issue on

summary judgment by deciding whether or not the waiver met the OWBPA checklist.[3]

It is clear, therefore, that employers who (unlike Allied) conscientiously follow the OWBPA are successfully avoiding litigation. Whatever the status of the "ratification" doctrine, no rational plaintiff who has signed a waiver – and no rational lawyer for such a plaintiff – will bring an ADEA suit unless he or she can mount a substantial OWBPA challenge against that waiver. It is these substantial challenges that "ratification" acts to deter. Such deterrence is contrary to the intent of Congress. The OWBPA aims to encourage meritorious challenges to noncomplying waivers. For example, as part of its overturning of the common law of waivers, Congress inverted the traditional burden of proof, and required the *employer* to show compliance with the OWBPA's specific requirements once the employee raises a challenge. 29 U.S.C. §626(f)(3).

Fifth, Allied argues that employees will get a windfall if allowed to challenge their waivers while keeping their benefits. This argument is without merit. If the waiver is struck down and plaintiff wins the lawsuit, the benefits plaintiff received are offset against the recovery. *Hogue*, 390 U.S. at 518; *Forbus*, 958 F.2d at 1041. If the

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[3] The six cases (as of the present writing) are (1) the present lawsuit; (2) *Walmsley*; (3) *Carr v. Armstrong Air Conditioning*, 817 F.Supp. 54 (N.D.Ohio 1993); (4) *Pierce v. A. T. & Santa Fe Ry. Co.*, 1992 WL 368044 (N.D.Ill. 1992); (5) *Seroka v. American Airlines, Inc.*, 834 F.Supp. 374, 377-78 (S.D.Ala. 1993); and (6) *Collins v. Outboard Marine Corp.*, 808 F.Supp. 590, 594-595 (N.D.Ill. 1992). Only in *Walmsley* did the court find any dispute of fact as to whether the waiver complied with the OWBPA.

waiver is upheld, then defendant gets what it paid for – a valid defense against the merits of the lawsuit. See *Isaacs v. Caterpillar*, 702 F.Supp. 711, 715 (C.D.Ill. 1988).

Where the waiver is struck down but the employer prevails on the merits, the employer can at least complain that it paid plaintiff money for a waiver that did it no good. Petition at 16. But even the common law is unsympathetic to such complaints. As noted above, even in jurisdictions with "ratification" doctrines, there are categories of unlawful waivers that cannot be ratified, so that the plaintiff is allowed to keep the consideration while attacking the waiver. The same rule prevails under the OWBPA, which forbids ratification of noncomplying waivers. Moreover, employers obtaining noncomplying waivers either know or should know that they are circumventing an important statute designed to protect employee rights. Under the OWBPA, such employers pay out money at their own risk. When such employers demand their money back, they are in effect asking a court to give them another chance after having been caught the first time.

Now consider the other side of the coin. "Ratification" would confer a windfall on defendants. It would frequently stop employees from suing even where the employer (1) has violated the ADEA, and (2) has obtained waivers through violation of the OWBPA. In such cases, whenever terminated employees lack the money to make a tender, "ratification" lets defendants off the hook from double wrongdoing.

The complaint of "windfall" to employees from refusing to impose "ratification" is therefore weak, at

best, compared to the certain windfall the doctrine would give to wrongdoing employers. Faced with this choice, Congress declined to impose "ratification."

In short, the text of the OWBPA forecloses "policy" arguments. But if such arguments could be considered, they would crush Allied's position.

II. ALLIED OFFERS NO BASIS FOR REVIEW OF THE COURT OF APPEALS' "COUNTERCLAIM" RULING

The court of appeals held that because Allied's waivers are ineffective, they cannot serve as the contract in a damage claim for breach of contract. The court of appeals also refused to hear Allied's non-contract claims for "equitable restitution" of the consideration. It held that Allied had waived such claims by neither pleading them nor asserting them in the district court. No basis exists for this Court to review either holding.

The substantive holding. Allied's petition does not challenge the self-evident holding that damages cannot be obtained for breach of an invalid contract. There is no conflict in the circuits as to this holding. So far as respondents are aware, there is no precedent in American legal history that disagrees with it.

Allied appears to argue that the OWBPA allows employees to agree that if their waivers are held invalid, they will give back the consideration received in exchange for the waiver. Petition at 21. There is no need to answer this argument (which Allied never made in the district court or court of appeals), because respondents

made no such agreement with Allied. Nothing in the Separation Agreements contemplates that the waivers might be invalid, much less agrees to return of the consideration in the event of their invalidity. All the Agreements contain is a waiver of claims, a waiver of the right to file a claim, and an agreement to pay damages in the event of breach of either waiver:

> Breach of this Agreement shall constitute a forfeiture of additional benefits referenced. If those benefits have already been conveyed as of the time of the breach, the employee agrees that he/she will return these benefits.

App. 29a. It was this breach provision that Allied was trying to enforce in its counterclaims. As the court of appeals held, if the waivers are ineffective, Allied cannot get damages for their breach.

The procedural holding. The court of appeals held that Allied waived any claim for "equitable restitution" by neither pleading nor arguing any such theory in the district court. No argument exists for this Court to review this hornbook holding. Allied does not dispute that it never pleaded "equitable restitution" nor mentioned such a theory in the district court.

The "restitution" argument would have been meritless even if it had not been waived. Allied is arguing that even if respondents' waivers are ineffective, and even if respondents need not tender back the consideration in order to sue, Allied may maintain an independent claim for "equitable restitution" of the consideration. So far as respondents are aware, no federal or state court in America has ever held such a thing. Such a restitution claim

would be barred by the settled common law of restitution. *See* Restatement of Restitution (1937), §108(e); Restatement of Contracts, §§598-609.[4]

Moreover, allowing Allied an independent action for restitution of the consideration would in effect reintroduce "ratification" through the back door. If such a claim were allowed, the OWBPA would rule out ratification, or requiring a "tender" as a condition of bringing the suit, yet the employer would be guaranteed the right to recover its money.

In sum, no claim may be brought for recovery of money paid to secure waivers that fail to comply with the OWBPA – whether the breach of contract claim Allied asserted, or the "equitable restitution" claim it failed to assert. An employer like Allied who pays for a noncomplying waiver acts at its own risk. Any other rule would undermine the Congressional purpose of assuring that employers heed this statute, instead of ignoring it, as Allied did.

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[4] Section 133 of the Restatement of Restitution provides that if the other party is "privileged not to perform because of illegality", the first party can get restitution only "in accordance with the rule stated in the Restatement of Contracts, §§598-609." §598 of the Restatement of Contracts provides that "A party to an illegal bargain can neither recover damages for breach thereof, nor, by rescinding the bargain, recover the performance that he has ren-dered thereunder or its value, except as stated in §§599-609." None of the exceptions of §§599-609 even arguably applies to the present situation.

CONCLUSION

Respondents respectfully request that the petition for a writ of *certiorari* be denied.

Respectfully submitted,

GEORGE F. GALLAND, JR.
DAVIS, MINER, BARNHILL
& GALLAND, P.C.
14 West Erie Street
Chicago, IL 60610
(312) 751-1170

Attorney for Respondents
Date: May 2, 1994